82-1325

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

I.A.M. NATIONAL PENSION FUND,
Petitioner,

v.

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Petitioner is a jointly-trusteed, collectively-bargained, multiemployer labor-management pension fund designed in compliance with, and operating under, the provisions both of Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), and of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.* The court of appeals held that a pension plan rule adopted by petitioner's trustees, under which plan participants' past service credits (*i.e.*, credits attributable to their eligible employment with their employer before that employer began to contribute to the plan) are cancelled if the employer's obligation to contribute to the plan terminates, is neither necessary nor reasonable, and is therefore unlawful. Under these circumstances, the questions presented by this petition are:

1. Whether, after *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982), federal courts have jurisdiction to review for "reasonableness" substantive pension fund eligibility standards adopted by the fund trustees?

2. Whether federal courts have jurisdiction under Section 302(c)(5) of the LMRA or Section 404(a)(1) of ERISA to require pension funds regulated by those statutes to prove that pension eligibility standards which Congress explicitly authorized in ERISA are "reasonable" or "necessary"?*

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* All parties to this proceeding are named in the caption of the case in this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

Statutes

TABLE OF AUTHORITIES—Continued

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The I.A.M. National Pension Fund ("the Fund") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment entered by that Court on August 20, 1982, in *Madge H. Elser and Margaret E. Thomas vs. I.A.M. National Pension Fund*, Nos. 80-6095 and 81-5024.

OPINIONS BELOW

The opinion of the court of appeals in this case is reported at 684 F.2d 648, and is reproduced in the Appendix to this Petition at pages 28a-46a. The court's order denying the Fund's petition for rehearing and suggestion for rehearing *en banc* was entered on November 10, 1982, and is reproduced at page 47a of the Appendix. The unreported memorandum opinion issued by the district court on September 5, 1980, is reproduced in the Appendix at pages 1a-9a. The district court's findings of fact and conclusions of law were entered on November

26, 1980, and amended on April 20, 1981. They are reproduced in the Appendix at pages 10a-27a.

JURISDICTIONAL STATEMENT

The opinion of the court of appeals was issued on August 20, 1982. A petition for rehearing and suggestion for rehearing *en banc* was timely filed on September 2, 1982. That petition was denied, and the suggestion for rehearing *en banc* rejected, by order entered on November 10, 1982.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c)(5), provides

> (c) The provisions of this section shall not be applicable
>
> . . . .
>
> (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed

basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities;

Section 203(a)(3)(E)(i) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. § 1053(a)(3)(e)(i), provides

> (E)(i) A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

Section 203(b)(1)(C) of ERISA, 29 U.S.C. § 1053 (b)(1)(C), provides

> (b)(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:
>
> . . . .
>
> (C) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan, defined by the Secretary of the Treasury;

Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), provides

> (a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

STATEMENT OF THE CASE

A. Introduction.

Petitioner IAM National Pension Fund ("the Fund") is a collectively bargained, jointly-trusteed labor-management pension fund, organized in 1960 by the International Association of Machinists and Aerospace Workers, AFL-CIO ("the IAM") and certain employers of persons who were represented for collective bargaining by affiliates of the IAM. The Fund complies, in design and operation, with the explicit requirements of Section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5).[1] The Fund is a "multiemployer plan" within the meaning of Section 3(37) of ERISA, 29 U.S.C. § 1002(37), and a "defined benefit plan" within the meaning of Section 3(35) of ERISA, 29 U.S.C. § 1002(35).

Under the Rules of the Fund's Benefit Plan A,[2] covered employees (*i.e.*, employees working under collective bargaining agreements which obligate their employers to contribute to the Plan) must have at least 10 years of

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[1] Thus, the Fund's Board of Trustees is composed of equal numbers of IAM-designated and employer-designated members; employer participation in and contributions to the Fund may be secured only through collective bargaining, and are permitted only on such terms as are detailed in the written agreements which that bargaining produces. *See* 29 U.S.C. § 186(c)(5)(B); *see also National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322 (1981).

[2] For historic reasons not here pertinent, when this litigation arose the Fund administered three separate plans of pension benefits. The controversy from which the questions presented here arise involves the rules governing the largest of those three defined benefit plans, known in the Fund as Benefit Plan A.

"credited service" to qualify for pension benefits. "Credited service" falls into two categories: in general, "future service" credits are granted for all the time an employee works under a collective bargaining agreement imposing a contribution obligation on the employer, while "past service" credits are granted to all employees working for an employer on the date that employer's contractual obligation to contribute commences, for their prior eligible employment with that employer. This system of granting pension credit for both "paid" and "unpaid" work time allows older, long-service employees to receive full pension benefits upon retirement from covered employment, even though in many individual cases no contributions will have been paid to the Fund for much of the service upon which such benefits are based.

Because benefits in the Plan are calculated on the basis of both "past" and "future" service, however, this system necessarily entails the assumption by the Fund of an immediate unfunded past service liability whenever a new employer joins the Plan.[3] Any unfunded past service liability left behind by employers who withdraw after relatively short periods of participation must therefore be made up by the remaining participants and employers.[4]

As a measure of protection against the risk that an employer's participation will *not* continue long enough to discharge his unfunded liability, the Fund Trustees have adopted certain safeguards against employer termination which enable the Fund to avoid any further liabil-

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[3] *See e.g., Lodge 199, IAM and Baltimore Rebuilders, Inc.*, 235 NLRB 1491, 1496-97 (1978), *review denied sub nom. Baltimore Rebuilders, Inc. v. N.L.R.B.*, 611 F.2d 1372 (4th Cir. 1979), *cert. denied*, 447 U.S. 922 (1980).

[4] ERISA requires covered pension plans to amortize their unfunded past service liability over a 30- or 40-year period. *See* 29 U.S.C. § 1082. *Cf. Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 364, n. 7 (1980).

ity attributable to a terminated employee group's "past service". At all times pertinent to this controversy, Article IX, § 4, of the Rules of Plan A has provided, in essence, that termination of participation by any employer who thereafter continues in the same or a related business will automatically cause the cancellation of past service credits for all covered employees of that employer who have not already retired. Future service credits are not affected, nor is the benefit status of any employee who has already been awarded a pension. These provisions are intended to protect the Fund against the "dumping" of unfunded liability attributable to past service by providing employers and employee groups with an incentive to insure that employers' contributions to the Fund continue.[5]

Application of the Article IX, § 4, past service cancellation provisions will not, by itself, cause the denial of pension benefits to any participant. Rather, invocation of that Rule will mean only that affected participants thereafter will be entitled to pension vesting and benefit accrual credit only for those years of employment with the terminated employer during which that employer contributed to the Plan.[6]

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[5] An employer's collectively-bargained obligation to contribute to the Fund can terminate by operation of any one of several processes. Thus, the employees may, as happened in this case, elect to decertify their union, or the union and the employer may enter into a new collective bargaining agreement which no longer requires pension contributions. *See Central Tool Co. v. IAM National Pension Fund*, 523 F. Supp. 812 (D.D.C. 1981) (appeal pending). In any event, decisions to enter and leave the Fund must be made by collective bargaining parties; the Fund's Trustees have no control over those decisions. *See N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322.

[6] The cancellation provision in Article IX, § 4, does not apply to certain classes of employees, among whom are employees who left covered employment more than two years before the employer

B. Respondents' Participation in Plan A.

Respondents Madge Elser and Margaret Thomas are former employees of the Waste King Corporation of Los Angeles, California. Waste King began paying contributions to Plan A on January 1, 1969, pursuant to a collective bargaining agreement with an IAM Local Lodge ("the Union") representing its production and maintenance employees. Under that and succeeding collective bargaining agreements, Waste King's contributions to Plan A continued until January 31, 1975, when the contract between Waste King and the Union expired and was not renewed. Shortly thereafter, on February 28, 1975, the employees in the bargaining unit represented by the Union voted, in an election held under National Labor Relations Board auspices,[7] to decertify the Union as their collective bargaining representative. Upon learning of these events, the Fund notified both Waste King and the Union that under Article IX, § 4, of the Plan A Rules, the termination of Waste King's contributing employer status resulted automatically in the cancellation of past service credits for all covered employees still in Waste King's employ.

Respondents had been employed in Waste King's production and maintenance unit throughout the period of Waste King's participation as a contributing employer in Plan A, and were among the employees to whom the Plan A Rules conditionally extended the right to receive credit for past service. Since both were still actively employed by Waste King when Waste King's participation terminated, they were among the employees whose past service credits in Plan A were cancelled by operation of Article IX, Section 4.

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terminated his participation, or within thirty days after that date. Additionally, affected employees who earn five years of future service with another contributing employer within eight years after their employer's termination will have their cancelled past service credit restored.

[7] *See* 29 U.S.C. § 159(c).

C. Proceedings Below.

After both respondents had applied to the Fund for Plan A pensions, and those applications had been rejected for lack of sufficient credited service,[8] respondents brought this action in the district court for the Central District of California on June 30, 1978.[9] They alleged that the Rules of Plan A which require the cancellation of past service credit in these circumstances violated Section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5) (1976), and Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1) (1976). Invoking the district court's subject matter jurisdiction under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), and under Section 302 of the LMRA, respondents sought declaratory and injunctive relief which would require the Fund unconditionally to reinstate their past service credits in Plan A for all purposes.

Upon submission on a stipulated record, the district court accurately recognized that the Plan A Rules made the right to benefit from credit for past service a conditional one, subject to continuation of the employer's obligation to contribute (App. 2a). The court also recognized that the Plan A Rules exempt from the past service cancellation provisions any employees who retire and qualify for pensions while their employer continues to contribute, and that the Rules contain certain "relief provisions" (*see* n.6, at p. 7, *supra*) designed "to mitigate

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[8] Both Thomas and Elser retired from Waste King after Waste King's participation in Plan A had terminated. Because their past service credits had been cancelled, their only recognized credited service in Plan A was future service of approximately six years. Under the Plan A Rules then (and now) in effect, and in conformity with one of the three alternative minimum vesting schedules authorized in ERISA, ten years of credited service is necessary to vest. *See* 29 U.S.C. § 1053(a)(2)(A).

[9] The action was brought as a class action, and two subclasses, containing a total of approximately 75 employees, were certified by the district court.

the harsh consequences of an employer's non-payment" (App. 2a).

Nevertheless, the court found the cancellation provisions in Article IX, § 4, to be "arbitrary and capricious on their face and as applied to plaintiffs" (App. 6a), in violation of Section 302(c)(5), because the operation of one of the relief provisions in the Rule enabled employees who had less future service in the Plan than did respondents to avoid cancellation of past service.

Recognizing that past service credits represent an unfunded liability to the Fund, which the Fund must "amortize" through future contributions, the court nonetheless rejected the Fund's use of its past service cancellation rules because, in the court's judgment,

> there are other methods of accomplishing this [*i.e.*, of protecting the fund against the assumption of unamortized past service liability] than treating groups of employees unequally, especially when the employees for whom the greatest amount of contributions have been made are the ones who lose their pensions.

(App. 8a).[10]

The court concluded that Article IX, § 4, violated ERISA § 404(a)(1) as well, since in the court's view, any

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[10] The court also concluded that the Fund's past service cancellation rules violated what it described as the "sizeable exclusion/reasonable justification" standard which it extrapolated from § 302(c)(5). On the issue which it identified as one of "reasonable notice," the court found that respondent Thomas "did not receive proper notice of the cancellation provision and relief provisions" (App. 6a), notwithstanding the stipulated facts that copies of the Plan A Rules had been supplied to Waste King, and to the Union for distribution, when Waste King commenced participation in the Fund, and that copies of the Rules had been mailed by the Fund in 1974 to each covered employee at his/her last known address. The court found that respondent Elser *did* receive adequate notice of the cancellation provisions because she had attended a union meeting at which the consequences of decertifying the union were discussed (App. 7a).

trustee conduct found to be "arbitrary and capricious" under Section 302(c)(5) necessarily also violated the trustees' obligation under Section 404(a)(1) to discharge their duties with respect to the plan "solely in the interest of the participants and beneficiaries." The court readily acknowledgd that ERISA "permits a multiemployer plan to provide for the cancellation of past service credit upon an employer's cessation of contributions," but accorded that legislative judgment no significance in light of the court's own determination that the Plan A past service cancellation provisions "are otherwise objectionable because they are discriminatorily applied." (App. 8a.)[11]

On the Fund's appeal, the Court of Appeals for the Ninth Circuit affirmed. Relying on its earlier opinion in *Ponce v. Construction Laborers' Pension Trust*, 628 F.2d 537, 543 (9th Cir. 1980), and without citing the language of any Fund document, the court found that

> the purpose of *the Fund* is to provide benefits to as many intended employees as is economically possible while protecting the financial stability of the Fund.

(App. 43a (emphasis added)).[12] The court recognized that

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[11] The court's ERISA analysis concluded with a single cryptic sentence, for which no authority was cited:

> Also the fact that the cancellation and relief provisions are contained in the plan documents does not meet the standard under ERISA, which requires that the provisions be reasonable under the circumstances.

App. 8a.

[12] The court's reliance on *Ponce*, which had in turn relied upon *Gaydosh v. Lewis*, 410 F.2d 262, 266 (D.C. Cir. 1969), for this proposition, was a fundamental error. The *Gaydosh* court had found, from its examination not of § 302(c)(5), as *Ponce* held, but of the fund documents before it in that case, that this was the "purpose" of *that fund*. The *Ponce* court took that language entirely out of the *Gaydosh* context and held that it described the

> the fiscal integrity of the plan depends upon continuing contributions from the employer to pay not only for the current service credit but also to amortize the liability for past service credit[,]

(App. 43a) but refused to sanction the Fund's use of its past service cancellation rule because the Fund had not made a particularized actuarial demonstration *to the court in this case* that such cancellation was "necessary or reasonable to protect the financial stability of the fund [footnote omitted]" (App. 46a). Following the analytical lead of the district court in *Central Tool Co. v. IAM National Pension Fund*, 523 F. Supp. 812 (D.D.C. 1981) (appeal pending), the court ruled that

> the Fund has the burden of showing some rational nexus between the Fund's purpose and the forfeiture provisions.

(App. 45a-46a). Since the Fund had relied upon the provisions in ERISA which specifically authorize past service cancellation in the event of termination of employer participation, *see* text at 18-20 *infra*, and since, by definition, there is no precise "fit" between contributions and benefits in a defined benefit plan, the Fund had offered no proof that cancellation was actuarially required in this instance. The court concluded that, because the Fund had failed "to meet its burden of showing a reasonable relationship between the cancellation provisions and the purpose of the fund," (App. 46a), those provisions were "arbitrary and capricious" (*id.*), and affirmed.

The Fund petitioned for rehearing and suggested that the matter be reheard *en banc*, contending that the court

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"purpose" of § 302(c)(5). The erroneous *Ponce* construction of the primary purpose of § 302(c)(5), relied upon below, clearly cannot be reconciled with this Court's holding in *N.L.R.B. v. Amax Coal Company*, 453 U.S. at 331, that "the '*sole purpose*' of § 302(c)(5) is to ensure that employee benefit trust funds 'are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them' " (emphasis added).

had ignored both the Congressional determination, evidenced in ERISA, that cancellation of past service credit in these circumstances is appropriate, and this Court's determination in *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982), that Section 302(c)(5) does not empower the federal courts to redesign pension plan eligibility rules in order to satisfy the court's own standards of reasonableness.[13] That petition was denied on November 10, 1982 (App. 47a).

REASONS FOR GRANTING THE WRIT

I. The Conflict Between The Court of Appeals' Decision And This Court's Decision in *United Mine Workers of America Health and Retirement Funds v. Robinson* Presents An Important Issue Of The Proper Role Of Federal Courts In The Enforcement of ERISA.

The court of appeals' decision in this case constitutes a patently unauthorized exercise by the court of an assumed power to substitute its own judgment for that of pension fund trustees on questions of allocation of pension benefits among eligible participants and beneficiaries. The court purported to find this authority in a line of appellate court decisions construing the purpose and scope of LMRA § 302(c)(5), a line which petitioner believes this Court has unequivocally repudiated. The court compounded its error, moreover, by holding that the amorphous, ill-defined standard of "reasonableness" formerly held (by the court below and several other courts of appeals) to be implicit in Section 302(c)(5) is implicit in ERISA § 404(a)(1) as well.

In the court's view, Section 404(a)(1) empowers courts to apply this reasonableness test to each plan's eligibility rules on a case by case basis, and to require the plan to demonstrate that its rules are reasonable both facially

[13] *Robinson* was decided on March 8, 1982, two days before this case was argued in the court of appeals, and approximately five months before it was decided.

and as applied (App. 37a-38a). Petitioner here could not have met the burden imposed by the court without proving, by actuarial evidence, that Waste King's contributions were inadequate to pay for the current service credits, and to amortize the liability for past service credits, of the particular class of Waste King participants (App. 46a). Under the court's analysis, any pension plan benefit eligibility standard could, at the instance of any participant who could not satisfy the prescribed standard, be challenged in court, and the plan then required to demonstrate to the court's satisfaction that the rule is reasonable.

Both the patent conflict between the decision below and *Robinson*, and the significant impact that decision will have on the development of the law under ERISA and the administration of employee benefit plans governed by that "comprehensive and reticulated" regulatory scheme, *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980), make this Court's review and correction of the decision below necessary.

This Court ruled last Term that Section 302(c)(5) of the LMRA does not empower federal courts to " review for reasonableness" those terms of a collective bargaining agreement "allocating health benefits among potential beneficiaries of an employee benefit trust fund." *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. at 564. The Court's review of the legislative history of Section 302(c)(5), and of its own prior decisions construing that provision, led to the unanimous conclusion that Section 302(c)(5)

> was meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private benefit of faithless union leaders.

Robinson, 455 U.S. at 571-72. That statute does *not*, in this Court's view, impose any

> general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness.

Id. at 574.

The court below dismissed *Robinson* as inapplicable to this case. Noting that in *Robinson* this Court had reserved the question of "whether [under § 302(c)(5)] federal courts sitting as courts of equity are authorized to enforce [traditional fiduciary duties]", the court concluded that it, too, could avoid that issue. Instead, the complaint having alleged violations of ERISA § 404 as well as of LMRA § 302(c)(5), the court exercised its jurisdiction under Section 502 of ERISA, 29 U.S.C. § 1132. (App. 35a-37a).

That alternative jurisdictional predicate made no substantive difference in the outcome, however, because the court held that the standard of review to be applied under ERISA § 404 was the same as that which would have been applied under Section 302(c)(5).[14] The court thus analyzed the Fund's past service cancellation rule in light of its own prior constructions of Section 302(c)(5), without regard to this Court's contrary controlling construction of that statute in *Robinson*. Unencumbered by *Robinson*, the court held that the Fund's past service cancellation rules

> are arbitrary and capricious, and have a structural defect in violation of § 302 of the LMRA and § 404 of the ERISA, by reason of [the Fund's] failure to meet its burden of showing a reasonable relationship between the cancellation provisions and the purpose of the fund, i.e., that the provisions were necessary to preserve the financial soundness of the Fund.

App. 46a.

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[14] The court relied for this proposition on this Court's statement in *N.L.R.B. v. Amax Coal Co.*, 453 U.S. at 322, that "ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet."

The broadly interventionist construction of Section 302 (c) (5) upon which the court of appeals relied is, we believe, squarely at odds with *Robinson*. As this Court there recognized, Section 302(c) (5) simply does not constitute a roving commission to the federal courts to redesign employee benefit plans in ways which more nearly fit the courts' own judgments of "reasonableness." Nor, we think, can it plausibly be contended that *Robinson* applies only to challenges to eligibility rules established directly through collective bargaining. The *Robinson* analysis of the scope of Section 302(c) (5) was based principally upon this Court's examination of the intended purpose and explicit terms of that statute. The Court's examination reveals no reason to believe that Congress intended, when it enacted Section 302(c) (5), to subject trustee-determined eligibility requirements to any broader judicial supervision than applies to collectively bargained eligibility requirements.[15]

That this Court did not intend *Robinson* to suggest any such distinction is demonstrated by the Court's summary disposition of the petition for certiorari in *Western Conference of Teamsters Pension Trust Fund v. Music*, —— U.S. ——, 74 L. Ed. 2d 48 (1982). Like this case, and unlike *Robinson*, *Music* involved a challenge to a pension eligibility rule adopted in the first instance not through collective bargaining, but, as is far more typical, by the fund trustees. As it did in this case, the Court of Appeals for the Ninth Circuit had stricken the rule because

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[15] Indeed, it is self-evident that no such attempted distinction would make sense, because, under such a rule, it would be a simple matter for collective bargaining parties routinely to shield trustee-adopted eligibility rules from scrutiny by simply incorporating them by reference into collective bargaining agreements. In fact, for reasons wholly unrelated to the issues present here, it has long been the practice in this Fund to do precisely that. The standard contract language used by IAM local unions and employers who agree to participate in the Fund provides that Employer and Union adopt and agree to be bound by the Fund's Trust Agreement and the plan rules adopted by the Trustees.

> [t]he Trust Fund has demonstrated no reasonable justification [for it].

Music v. Western Conference of Teamsters Pension Trust Fund, 660 F.2d 400, 405 (9th Cir. 1981). This Court granted the pension fund's petition for writ of certiorari, summarily vacated the court of appeals' decision, and remanded the case for further consideration in light of *Robinson*. That action was taken while the petition for rehearing in this case was pending, and it was brought to the court's attention. The court nonetheless has construed Section 302(c)(5) here just as it did in *Music*.[16] It purported to do so, moreover, not merely as a matter of construing Section 302(c)(5), but as a matter of construing ERISA § 404 as well.

Despite Congress' evident belief that it had occupied the field of regulation of these funds when it enacted ERISA, the decision below would authorize the federal courts, acting in the name of ERISA enforcement, to impose substantive regulations more stringent than those imposed by Congress, and to require employee benefit funds to prove, to the courts' satisfaction on a case-by-case basis, the actuarial necessity for any benefit eligibility rule which offends the courts' own sense of equity. *Robinson* plainly teaches, we believe, that federal courts have no such authority.

Because of the lower court's evident doubt about the reach of *Robinson*, and because of its reliance upon ERISA § 404 as well as LMRA § 302(c)(5) in reaching the conclusion forbidden by *Robinson*, review and correction by this Court is necessary. Otherwise, federal courts following the lead of the court below will continue to assume broad discretionary power to review presumptively lawful eligibility rules prescribed by the trustees of employee benefit plans, and to impose substantive regula-

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[16] As of this writing, the court of appeals has not acted on the *Music* remand.

tions more stringent than those enacted by Congress in LMRA and ERISA. The decision below thus ignores this Court's admonitions in *Robinson* and impermissibly enlarges the role of the federal courts in the enforcement of ERISA.

II. The Court of Appeals' Holding That ERISA § 404 Authorizes Courts To Impose More Stringent Substantive Standards Of Pension Eligibility Than Are Required By ERISA Raises An Important Question Of Federal Law Which Should Be Resolved By This Court.

In ERISA, Congress expressly authorized the use by pension funds like petitioner of past service cancellation as a legitimate device to protect against the consequences of employer termination. By invalidating that practice here, the court of appeals has substituted its own policy judgment for that of Congress, in contravention not only of the well-established general prohibition against judicial legislation but also of this Court's specific injunction against second-guessing the Congressional policy decisions embodied in ERISA. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510-521 (1981).

Analysis must begin with the proposition, not disputed by the court below, that the minimum vesting standards of ERISA do not require past service to be credited *at all.* ERISA § 203(b)(1)(C) permits disregarding past service altogether,[17] as do the analogous ERISA provisions of the Internal Revenue Code which prescribe identical

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[17] Section 203 of Title I of ERISA, which is captioned "Minimum vesting standards," provides in pertinent part that:

> (b)(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this [minimum vesting standards] section, all of an employee's years of service with the employer or

vesting standards,[18] and the tax regulations adopted thereunder.[19]

It is equally clear, moreover, that multiemployer plans which *elect* to credit such past service, as this Fund has, are permitted to do so conditionally, and may, consistent with the ERISA scheme, forfeit any rights which would otherwise have been attributable to such past service upon the failure of the specified condition.[20]

That Congress specifically intended to permit multiemployer plans to condition the grant of past service credits upon continuation of the employer's participation, as the Fund has done here, is reaffirmed by Congress' enactment of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980) ("MPPAA"). In Section 303 of MPPAA, 94 Stat. 1292, Congress amended the minimum vesting

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employers maintaining the plan shall be taken into account, *except that the following may be disregarded*:

* * * *

(C) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan, defined by the Secretary of the Treasury.

29 U.S.C. § 1053(b)(1)(C) (emphasis added).

[18] *See* 26 U.S.C. § 411(a)(4)(C).

[19] *See* 26 C.F.R. § 1.411(a)-5, and in particular 26 C.F.R. § 1.411(a)-5(b)(3), and 26 C.F.R. § 1.411(a)-5(b)(3)(ii). Under ERISA § 3002(c), 29 U.S.C. § 1202(c), the Treasury vesting regulations are applicable to both the labor provisions and the tax provisions of ERISA.

[20] Again, the Treasury Regulations leave no doubt on the point:

To the extent that rights are not required to be nonforfeitable to satisfy the minimum vesting standards, or the nondiscrimination requirements of section 404(a)(4), *they may be forfeited without regard to the limitations on forfeitability required by this section.*

26 C.F.R. § 1.411(a)-4(a) (emphasis added).

standards provided in Section 203 of Title I of ERISA to specify that

> A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

29 U.S.C. § 1053(a)(3)(E)(i).[21]

Notwithstanding that its jurisdiction was found in ERISA, the court of appeals did not advert to this elaborate and explicit statutory regulatory scheme at all.[22] The court held, in substance, that the past service cancellation device authorized and approved by Congress may only be used when a pension fund is prepared to "meet its burden of showing . . . that the provisions [are] necessary to preserve the financial soundness of the Fund" (App. 46a).

The legislative judgments embodied in ERISA may not, however, so lightly be displaced. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, the Court held that the states may not legislatively prohibit a pension plan provision which Congress has implicitly authorized. In that case, a statute of the State of New Jersey had prohibited the use of workers' compensation offset provisions in pension plans. In its review of that statute, this Court found that, in enacting ERISA, Congress had expressly

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[21] This provision was not new in 1980, of course. Similar language, originally contained in ERISA § 3(37), 88 Stat. 833 (1974), was deleted from ERISA by MPPAA as superfluous. MPPAA § 302, 94 Stat. 1291-92.

[22] The absence of any such discussion in the court's opinion was one of the grounds advanced in support of the petition for rehearing below, which the court denied.

authorized, although it did not require, the use of similar offsets with respect to Social Security Act and Railroad Retirement Act benefits. The Court found in those two explicit offset provisions a Congressional policy to permit similar offsets with respect to other, similar "income streams," and held that neither the states, acting legislatively, nor the federal courts, were free to substitute their own policy judgments for those of the Congress.

> Our judicial function is not to second-guess the policy decisions of the legislature, no matter how appealing we may find contrary rationales.

Alessi, 451 U.S. at 521.

The proposition that it is not the proper function of the courts to legislate is hardly a novel one.[23] And if the offset provisions which the *Alessi* Court found to have been implicitly sanctioned in ERISA are protected from judicial second-guessing, it follows *a fortiori* that the explicitly authorized past service cancellation devices set aside by the court of appeals must be similarly protected.[24]

If the court below is correct, however, the entire substantive regulatory scheme embodied in ERISA would be fair game for judicial rewriting, notwithstanding these well-settled principles. Any eligibility rule which satisfies or exceeds the statutory standards might nevertheless be challenged by a participant who failed to meet it. On the view of the court of appeals, any fund faced with such a challenge could be required to prove that the standard it had chosen was "necessary" or "reasonable". The

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[23] *See, e.g., Hodel v. Indiana*, 452 U.S. 314, 333 (1981) ("[T]he District Court essentially acted as a superlegislature, passing on the wisdom of congressional policy determinations. In so doing, the court exceeded its proper role."); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) ("[J]udges are not accredited to supersede Congress . . . by embellishing upon the regulatory scheme.").

[24] *See Hepple v. Roberts & Dybdahl, Inc.*, 622 F.2d 962 (8th Cir. 1980).

court's approach flies in the face of established standards of due process,[25] and impermissibly ignores the presumption of validity to which the Congressional judgments evidenced in ERISA are entitled.[26]

We believe it plain that the court of appeals is seriously in error in its assumption that the courts are empowered to revise ERISA as they see fit.

> [F]ederal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy.

United States v. Rutherford, 442 U.S. 544, 555 (1979). Having occupied the field of pension plan regulation, Congress should be understood to have left the further development of substantive eligibility standards to collective bargaining, the discretion of plan trustees, and future legislation as needed, without participation by state or federal courts. To guarantee that the detailed substantive regulatory standards set forth in ERISA will be applied uniformly as they are written, and that the courts will not require proof of need for pension fund standards which Congress has explicitly found to be necessary and appropriate, the Fund respectfully urges that the Court grant this petition and, upon review, reverse the decision below.

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[25] *See, e.g., Norwood v. Harrison*, 413 U.S. 455, 471 (1973) ("[N]o one can be required, consistent with due process, to prove the absence of violation of law."); *cf. Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

[26] *Cf. Vance v. Bradley*, 440 U.S. 93, 111 (1979) ("In [a] . . . case of this type . . . those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true . . . ."); *United States v. Gainey*, 380 U.S. 63, 67 (1965) ("[I]n matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.")

CONCLUSION

For all the reasons set forth above, petitioner respectfully requests that a writ of certiorari be issued to review the decision of the court of appeals in this case.

Respectfully submitted,

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February 8, 1983

CONTENTS OF APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 78-2538-DWW (Sx)

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

I.A.M. NATIONAL PENSION FUND,
Defendant.

[Filed Sept. 5, 1980]

MEMORANDUM

Madge Elser and Margaret Thomas were employed by Waste King of Los Angeles. Particularly relevant to this case is the period of their employment from January 1, 1969 through January 31, 1975. Both women were refused pension benefits by defendant I.A.M. National Pension Fund (IAM) when they terminated their employment, even though they allegedly met both the age and service requirements for vesting of pension rights. Thomas terminated in August of 1975; Elser in October of 1977. They sued the pension fund seeking injunctive and declaratory relief under § 302(c)(5) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186(c)(5), and under § 404(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1104(a)(1).

The pension fund operates a multi-employer pension plan as defined in ERISA, 29 U.S.C. § 1002. To become participants in the plan, an employer and the local union must both sign a participation agreement. Waste King

joined the plan on January 1, 1969. In Article IV, the plan provides that "past service credit" can be given to employees for periods of their employment prior to the date on which their company began to make contributions to the fund. In order to qualify for a minimum pension benefit, a covered employee must have accumulated at least ten years of credited service; at least one year of that must be "future service credit," that is, accumulated while the employer was making contributions to the fund. Once the employee has accumulated 10 years of service credit, the pension vests, but is not paid until employee fulfills an additional requirement of attaining age 50.

An employee's right to have his pension benefits vest is expressly made subject to Section 4 of Article IX of the plan, which at the time Waste King joined the plan was Article VIII Section 4. It reads in part:

> "In the event that a Contributing Employer ceases to be obligated to make contributions to the Fund at any time after the period ending 48 months after its Contribution Date, and should that Employer or its successor thereafter continue in business, all years of Past Service credit based on employment with such Employer shall be cancelled retroactively, notwithstanding any contrary provisions contained elsewhere in this Plan."

There is an exception to the cancellation of past service credit for employees who are already retired and receiving benefits under the plan at the time the employer ceases making contributions. Also there are "relief provisions," which were later added by amendment to mitigate the harsh consequences of an employer's nonpayment. An employee can, 1) retain his past service credit if he terminates his employment at least 24 months before the employer ceases making contributions or within 30 days after that date, or 2) reinstate his past service

credit if he earns 5 years of future service credit within an 8-year period following the date the agreement was terminated.

In a National Labor Relations Board election held in early 1975, Waste King's employees decertified IAM District Lodge No. 94 as their collective bargaining representative. The collective bargaining agreement between Waste King and IAM was terminated as of January 31, 1975, and Waste King ceased making contributions to the fund. As a result, employees who had not already retired and who did not qualify under one of the "relief provisions" forfeited their past service credit. After forfeiting their past service credit, plaintiffs did not have the required 10 years of continuous service credit, their pension rights did not vest, and they were disqualified from receiving any pension benefits.

Defendant claims that notice of the cancellation provisions was given to Waste King employees in 1970 and again in 1974 by means of pension plan booklets which contained the rules and regulations of the plan. Allegedly, on February 18, 1970, the fund sent 400 copies of the pension booklet to District Lodge No. 94 with the intent that they be distributed to the covered employees. District Lodge No. 94 Business Representative George Rusnak delivered the pension booklets to the personnel department of Waste King and requested that the booklets be distributed to all bargaining unit employees when they received their next payroll checks. Also in July, 1974, the fund allegedly sent each pensioner, covered employee, contributing empyoyer, and IAM union office the 1974 revised edition of the pension booklet.

Plaintiffs claim that the fund did not notify them of the cancellation provision in the plan or of the relief provisions until June 3, 1975, several months after the employees had decertified the union and Waste King had ceased making contributions. By the time a letter of

notice was received from defendant, the 30-day grace period had already passed. By the time plaintiffs learned of the 5-year future service credit relief provision, they had already been unemployed too long to be able to meet this exception. Plaintiffs cannot recall receiving a booklet, pamphlet or other written literature that set forth a description of the plan and the text of the rules and regulations of the plan during the period of February 18, 1970 through February 28, 1975.

Defendant also claims that union representatives advised Waste King employees prior to the decertification vote that some of them might lose their past service credit if the employees decertified the union and Waste King ceased contributing to the fund. In fact a meeting of the membership of the union was held on December 9, 1974. Defendant claims that the union representative Charles Edwards who was also one of the five union trustees of the fund explained to the members in attendance that the employees stood to lose their pension benefits if the union was decertified. Madge Elser's name appears on the roster of members in attendance at the meeting. A second meeting was held on February 26, 1975, two days before the decertification vote. No attendance roster was prepared reflecting the attendance of the employees at that meeting.

Plaintiffs claim that prior to the decertification, they were not notified that the employees in the collective bargaining unit might lose their past service credit. Neither plaintiff remembers attending the union meeting of February 26, 1975.

The successor union to IAM filed unfair labor practice charges with the NLRB alleging that the fund trustees had restrained and coerced Waste King's employees in the exercise of their rights by causing the forfeiture of the employees' vested pension benefits and that the fund and IAM had discriminated against plaintiffs. These charges

were dismissed by the Regional Director and the dismissal was affirmed by the General Counsel.

This case has been submitted on an agreed statement of facts. The court decides this case on the basis of the written briefs of the parties and without benefit of witnesses or oral argument. The issues to be decided and stipulated by the parties are:

1. Whether the IAM Pension Fund violated the LMRA in adopting and applying eligibility rules for pension benefits, which cancelled plaintiffs' past service credit.

2. Whether the IAM Pension Fund violated ERISA in adopting and applying eligibility rules for pension benefits, which cancelled plaintiffs' past service credit.

3. Whether plaintiffs waived any cause of action arising under the adoption and application of the eligibility rules by their voluntary decertification of the IAM as their union.

4. Whether the prevailing party should be awarded attorneys' fees.

The courts have interpreted that they have power to decide whether there are structural violations of § 302(c)(5) of the LMRA, that is, whether the provisions of a pension fund are "for the sole and exclusive benefit of employees." *Burroughs v. Board of Trustees*, 542 F.2d 1128 (9th Cir. 1976); *Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1972); *Roark v. Lewis*, 401 F.2d 425 (D.C. Cir. 1968). Section 302 prohibits any payment by an employer to a representative of its employees except as expressly permitted by that section. Section 302(c)(5) exempts payments of "money or other things of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer . . . ."

In determining whether a retirement plan violates § 302, the Ninth Circuit has articulated three different

and distinct theories upon which liability can be based: 1) the arbitrary and capricious standard; 2) the reasonable notice standard; and 3) the sizeable exclusion/reasonable justification standard. *Lee v. Nesbitt*, supra; *Burroughs v. Board of Trustees*, supra.

This court is of the opinion that the cancellation provision and relief provisions are arbitrary and capricious on their face and as applied to plaintiffs. When plaintiffs' past service credit was cancelled, they no longer had the 10 years of service credit which was one of the requirements for vested pension rights. Plaintiffs' forfeiture stands in marked contrast to those persons who left Waste King's employment between January 31, 1970 and January 31, 1973, prior to the 24-month period. Those persons retained their past service credit. Any of them with the required 10 years of service credit are currently eligible for pension benefits once they reach age 50.

A cursory examination of the plan rules reveals that employees like plaintiffs who worked for Waste King for a longer period of time and on whose behalf Waste King made contributions to the fund for a longer period of time were the ones deprived of pension benefits. On the other hand, employees with 10 years of credit who left Waste King earlier and perhaps took up employment with other employers retained their past service credit and their right to pension benefits. These provisions cancelling past service credit for plaintiffs and not employees who left employment at least 2 years earlier are arbitrary and capricious on their face and as applied to plaintiffs.

Under the reasonable notice standard of review, this court finds that plaintiff Margaret Thomas did not receive proper notice of the cancellation provision and relief provisions. The fund claims that it gave notice of the provisions by sending out booklets to the employers and by having union representatives speak at the union meetings. These methods were inadequate to convey notice to Ms.

Thomas who apparently did not attend the meetings and did not receive a copy of the booklet. The 1974 pension plan booklets were issued almost one year before the union was decertified. Furthermore, sending booklets to the employer does not insure that they will reach the employees. In the June 3, 1975 letter that was sent long after the credits had been forfeited, there was no reference that plaintiffs could still preserve their past service credit if they obtained 5 additional years of future service credit by January of 1981. Mere announcement at union meetings is inadequate because many employees do not attend union meetings. A better kind of notice was that given in *Baltimore Rebuilders, Inc. v. NLRB*, 611 F.2d 1372 (4th Cir. 1979), in which the fund sent letters to each employee informing them of the cancellation provision and relief provisions in detail.

Madge Elser did receive adequate notice of the provisions. She signed the roster taken at the December 9 meeting, and the minutes from that meeting indicate that the union representative informed the members that they stood to lose their pensions if the employees decertified the union. However, the fact that Ms. Elser received adequate notice does not solve the problem that the provisions are arbitrary and capricious. Adequate notice is only one standard of review articulated by the courts.

The application of the cancellation and relief provisions caused a sizeable exclusion of employees from pension benefits without a reasonable justification for this exclusion. It prevented at least 75 employees from obtaining pension benefits although if their past service credit had been counted, their pension rights would have vested as of January 31, 1975. Of course, it is essential that in order for a pension fund of this type to remain actuarially sound, it must have enough funds being paid in to balance out the funds it will be required to pay out as benefits. This means that contributions must be paid in for some persons who never receive any benefits from

the plan. Also the value of past service credit must be amortized over several years and added to the contributions of the employer. But there are other methods of accomplishing this than treating groups of employees unequally, especially when the employees for whom the greatest amount of contributions have been made are the ones who lose their pensions.

The cancellation provision and the relief provisions of the IAM Pension Fund also violate § 404(a)(1) of ERISA. That section provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan . . . ." The standard of review under § 302 of the LMRA, the arbitrary and capricious test, is the same for cases brought under § 404 of ERISA. *Bueneman v. Central States Southeast and Southwest Areas Pension Fund*, 572 F.2d 1208 (8th Cir. 1978).

The trustees of the fund violated § 404(a)(1) because they treated plaintiffs disparately from other employees by cancelling their past service credit. It is true that ERISA permits a multi-employer plan to provide for the cancellation of past service credit upon an employer's cessation of contributions. See § 3(37) of ERISA, 29 U.S.C. § 1002(37). However, § 3(37) does not validate provisions that are otherwise objectionable because they are discriminatorily applied. Also the fact that the cancellation and relief provisions are contained in the plan documents does not meet the standard under ERISA, which requires that the provisions be reasonable under the circumstances.

Defendant contends that despite any fault in the provisions or with the trustees, plaintiffs are estopped to assert the invalidity of the fund provisions because they

voluntarily withdrew from the fund by decertifying the union. This argument is unconvincing. Plaintiffs did not voluntarily decertify the union. See *Norton v. I.A.M. National Pension Fund*, 553 F.2d 1352 (D.C. Cir. 1977); *Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1972).

The NLRB proceedings are irrelevant to a decision in this case. The issues in those proceedings were different from those being addressed in this action under the LMRA and ERISA, and the decision there did not obviate the possibility of violation of other statutes.

Judgment is ordered for the plaintiffs for the nonclass relief asked in the complaint. Plaintiffs shall prepare proposed Findings and a form of Judgment within 10 days.

DATED: September 5th, 1980.

/s/ David W. Williams
DAVID W. WILLIAMS,
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 78-2538-DWW (Sx)

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

I.A.M. NATIONAL PENSION FUND,
Defendant.

[Filed Nov. 26, 1980]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PRELIMINARY STATEMENT

On June 30, 1978, Plaintiffs MADGE ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated, filed an action in this Court for injunctive and declaratory relief to receive pension benefits pursuant to Section 302(c)(5) of the Labor-Management Relations Act of 1947, as amended (hereinafter referred to for convenience as "the LMRA") and Section 404(a)(1) of the Employee Retirement Income Security Act of 1974 (hereinafter referred to for convenience as "ERISA").

On September 17, 1979, the parties filed a Pre-Trial Order pursuant to this Court's Rules. At paragraph VIII thereof, the parties stipulated that there were no issues of fact to be litigated and that the case was to be submitted to the Court on an agreed stipulation of facts and the subsequent written briefs of the parties.

Additionally, at paragraph X of the same Pre-Trial Order, the parties stipulated that the determination of the class action status of this proceeding would be delayed until after the Court rendered its decision on the merits.

On September 5, 1980, the Court filed its Memorandum in this matter ordering judgment for the Plaintiffs for the non-class relief sought in the Complaint. On October 1, 1980, pursuant to the Court's permission, the Plaintiffs filed a Motion for Class Action Certification in this matter. The Defendant did not oppose this case proceeding as a class action but objected to the Plaintiffs' definition of the proposed class.

On October 30, 1980, this Court filed its Order granting class certification in this proceeding pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure and certified the class as follows:

> "(1) All employees of Waste King who left their employment between January 31, 1973 and January 31, 1975, with at least ten years of continuous service with Waste King and who did not retire during that time; and
>
> (2) All employees of Waste King with at least ten years of continuous service as of January 31, 1975, who were still employed by Waste King as of March 1, 1975."

There are approximately seventy-five (75) class members, ten (10) in Sub-Class No. 1 and sixty-five (65) in Sub-Class No. 2.

FINDINGS OF FACT

I.

Plaintiffs MADGE ELSER and MARGARET E. THOMAS and the class they represent were employed by Waste King at its Los Angeles, California facility for at least ten (10) consecutive years as of January 31, 1973 and/or January 31, 1975 and did not retire from Waste King prior to March 1, 1975.

II.

Defendant is a jointly administered multi-employer pension plan structured in accordance with the requirements promulgated by Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5) and as defined in the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002.

III.

This Court has jurisdiction over this matter pursuant to Sections 502(a)(1)(B) and 502(e)(1) and (2) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1132(a)(1)(B) and 1132(e)(1) and (2) and § 302(e) of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 186(e).

IV.

Defendant Fund was established to provide retirement benefits for employees for whom contributions are made under the terms of collective bargaining agreements. From 1969 through January 31, 1975, Waste King was signatory to a collective bargaining agreement with Machinists District Lodge No. 94 and Local Lodge No. 1571 covering the terms and conditions of employment of all production and maintenance employees employed by Waste King, including Plaintiffs Elser and Thomas and the class they represent.

V.

From January 1, 1969 through January 31, 1975, Waste King made pension benefit contributions on behalf of all of its production and maintenance employees, including Plaintiffs Elser and Thomas and the class they represent, to the Fund which totaled $423,728.00.

VI.

The last collective bargaining agreement between Waste King and the Machinists Unions expired on January 31, 1975 and that was the last date Waste King made pension contributions to the Defendant Fund on behalf of its production and maintenance employees.

VII.

On February 28, 1975, in an election conducted by the National Labor Relations Board, the production and maintenance employees of Waste King decertified the Machinists Unions as their collective bargaining representatives.

VIII.

All of the individuals in Sub-Class No. 1 did not vote in the aforementioned decertification election because they were not employed by Waste King at the time of the election. Plaintiffs Elser and Thomas and the class they represent in Sub-Class No. 2 did not voluntarily decertify the Machinists Unions * * *.†

IX.

Plaintiff Thomas terminated her employment with Waste King in a bargaining-unit capacity in August of 1975 and Plaintiff Elser did the same thing in October of 1977. Immediately after both named Plaintiffs terminated their employment with Waste King in a bargain-

† [Editor's Note: The district court crossed out certain portions of plaintiffs' proposed findings of fact and conclusions of law and then entered them as its own. "* * *" indicates where such deletions were made.]

ing-unit capacity, they contacted the Defendant Fund regarding their pension eligibility. Upon doing so, Defendant Fund informed them that they were not entitled to a pension because they did not meet the minimum eligibility requirements of ten (10) years of Credited Service.

X.

The class Plaintiffs Elser and Thomas represent were told and/or would have been told the same thing by Defendant Fund when and/or if the class applied for a pension when they and/or would have terminated their employment with Waste King in a bargaining-unit capacity.

XI.

On October 14, 1975, Teamsters Union Local 986 filed an unfair labor practice charge with the National Labor Relations Board against Defendant Fund's Trustees and the Machinists Unions contending that the decision to cancel the past service credit of Plaintiffs Elser and Thomas and the class they represent because the production and maintenance employees of Waste King voted to decertify the Machinists Unions was an unfair labor practice which restrained and/or coerced said employees in the exercise of Union activities. The Teamsters Union contended that such conduct unlawfully discouraged employees from voting to decertify the Machinists Unions and unlawfully discriminated against them if they subsequently did. The National Labor Relations Board eventually dismissed the aforementioned unfair labor practice charge because the statute of limitations had elapsed. The aforementioned National Labor Relations Board proceedings are irrelevant in the instant proceeding because the National Labor Relations Board addressed different issues concerning interpretations of different statutes than what is before the Court in the instant proceeding.

XII.

In Article IV of the Pension Plan, it provides that "past service credit" can be given to employees for pe-

riods of their employment prior to the date on which their company began to make contributions to the Fund. In order to qualify for a minimum pension benefit, a covered employee must have accumulated at least ten (10) years of credited service, one (1) year of which must be "future service credit," which is credit accumulated while the employer was making contributions to the Fund. Once the employee has accumulated ten (10) years of service credit which is the combination of past and future service, the pension vests, but is not paid until the employee reaches at least age 50.

XIII.

As of January 31, 1975, Plaintiffs Elser and Thomas and the class they represent were vested for pension purposes.

XIV.

The Plan also expressly states that an employee's right to a vested pension benefit is expressly made subject to Section 4 of Article IX of the Plan, which at the time Waste King joined the Plan was Article VIII, Section 4. It reads in part:

> "In the event the Contributing Employer ceases to be obligated to make contributions to the Fund at any time after the period ending 48 months after its Contribution Date, and should that Employer or its successor thereafter continue in business, all years of Past Service Credit based on employment with such Employer shall be cancelled retroactively, notwithstanding any contrary provisions contained elsewhere in this Plan."

XV.

There is an exception to the cancellation of past service credit for employees who are already retired and re-

ceiving benefits under the Plan at the time the employer ceases making contributions. There are also "relief provisions" which were added by amendment, to afford an employee the opportunity to retain his past service credit if he terminates his employment at least twenty-four (24) months before the employer ceases making contributions or within thirty (30) days after that date, or said employee can reinstate his past service credit if he earns five (5) years of future service credit within an eight (8) year period following the date the agreement was terminated.

XVI.

Waste King continued in business subsequent to the decertification of the Machinists Unions on February 28, 1975.

XVII.

Neither Plaintiffs Elser nor Thomas, nor anyone in the class they represent, terminated their employment with Waste King in a bargaining-unit capacity within thirty (30) days after January 31, 1975, the date Waste King ceased making contributions to the Fund.

XVIII.

Neither Plaintiffs Elser nor Thomas reinstated their past service credit subsequent to January 31, 1975 by earning five (5) years of future service credit on or before January 31, 1983.

XIX.

Subsequent to January 31, 1975, Defendant Fund did not initiate any correspondence directly to Plaintiffs Elser and Thomas and/or to the class they represent informing them that their past service credit had been cancelled and/or that they would reinstate their past service credit if they earned at least five (5) years of future service credit on or before January 31, 1983.

XX.

As a result of Waste King ceasing to make contributions to the Fund as of January 31, 1975 and the subsequent decertification of the Machinists Unions on February 28, 1975, Defendant Fund * * * Plaintiffs Elser's and Thomas' and the class they represent, past service credit. By failing to * * * such past service credit, Plaintiffs Elser and Thomas and the class they represent did not have the required ten (10) years of * * * service credit, no longer possessed vested pension rights, and were disqualified from receiving any pension benefits.

XXI.

The cancellation and relief provisions the Defendant Fund applied in the instant proceeding which effectively deprived Plaintiffs Elser and Thomas and the class they represent of a vested pension are arbitrary and capricious on their face and as applied to the Plaintiffs and the class they represent.

XXII.

Cancelling past service credit for employees like Plaintiffs Elser and Thomas and the class they represent who worked for Waste King for a longer period of time and on whose behalf Waste King made contributions to the Fund for a longer period of time in comparison to those employees who left Waste King's employment earlier and who retained their past service credit and their right to pension benefits was arbitrary and capricious.

XXIII.

On February 18, 1970, Defendant Fund sent copies to the then-existing pension booklet to Waste King with the intent that they be distributed to the covered employees. This was inadequate to convey to the employees reasonable notice of the cancellation and relief provisions that were in effect on January 31, 1975 because * * * sending

them to Waste King did not reasonably insure that they would reach Plaintiffs Elser and Thomas and the class they represent.

XXIV.

In July of 1974, approximately seven (7) months before the decertification election, Defendant Fund sent each pensioner, covered employee, contributing employer and I.A.M. Union office the 1974 revised edition of the pension booklet * * *.

XXV.

Neither Plaintiffs Elser nor Thomas recall receiving a booklet, pamphlet, or other written literature which set forth a description of the Plan and/or its rules and regulations prior to June of 1975, several months after the decertification election and Waste King had ceased making contributions to Defendant Fund.

XXVI.

* * * since Plaintiffs Elser and Thomas did not receive a copy of that booklet, the Defendant Fund's efforts in this regard were inadequate to convey reasonable notice of the cancellation and relief provisions that were in effect and applied by the Fund in February of 1975.

XXVII.

On December 9, 1974, a meeting was held of the membership of Machinists Local Lodge No. 1571 for the purpose of discussing the upcoming decertification election. At that meeting, which was attended by sixty-seven (67) members of the bargaining-unit, including Plaintiff Madge Elser, as reflected by the signatures of those who attended, the employees were told that if the decertification election was successful, the bargaining-unit employees stood to lose all pension benefits. Plaintiff Elser does not recall attending this Union meeting. Plaintiff

Thomas, whose name does not appear on the signature roster, also does not recall attending this meeting.

XXVIII.

Neither Plaintiffs Elser nor Thomas recall being notified by the Machinists Union and/or Defendant Fund that they might lose their past service credit if the Machinists Unions were decertified until on or after June 3, 1975.

XXIX.

Although Plaintiff Elser does not recall attending the December 9, 1974 Union meeting, her attendance at such, as reflected on the signed roster of those in attendance, constituted adequate notice of the relief and cancellation provisions. This is also true of the other class members who were in attendance at the Union meeting.

XXX.

A second Union meeting for the Waste King bargaining-unit employees was held on February 26, 1975. No attendance roster was prepared reflecting the attendance of those bargaining-unit employees who attended this meeting and neither Plaintiffs Elser nor Thomas recall attending this Union meeting.

XXXI.

Plaintiff Thomas did not receive reasonable and proper notice of the cancellation and relief provisions. In this respect, Plaintiff Thomas and those members of the class similarly situated were not given a reasonable opportunity to protect and insulate themselves from the impact of the Fund's application of the cancellation and relief provisions since Thomas did not attend either Union meeting and first became aware of the cancellation and relief provisions subsequent to June 3, 1975, when Defendant Fund sent Waste King a letter reflect-

ing that said employees' past service credit had been forfeited. Significantly, said written correspondence made no mention of the fact that said employees could restore their past service credit if they accumulated five (5) additional years of future service on or before January 31, 1983.

XXXII.

Unlike the notification sent by Defendant Fund in *Baltimore Rebuilders, Inc. v. N.L.R.B.*, 611 F.2d 1372 (4th Cir. 1979), in which the Defendant Fund sent letters to each employee informing them of the cancellation provision and relief provisions in detail, the Defendant Fund did not afford Plaintiff Thomas and those class members similarly situated a similar form of reasonable notice.

XXXIII.

The Defendant Fund's application of the cancellation and relief provisions in the instant proceeding caused a sizeable number of employees (approximately 75) from receiving pension benefits without a reasonable justification existing for the exclusion.

XXXIV.

Prior to implementing the cancellation and relief provisions, Defendant Fund did not calculate whether an unfunded liability existed for Waste King as of January 31, 1975 * * *.

* * * *

XXXVI.

Obviously, actuarial solvency is a critical determination but there were better ways the Fund could have accomplished this in the instant proceeding if indeed the Fund was faced with an unfunded liability resulting from Waste King's termination of participation in the Fund.

XXXVII.

The Defendant's implementation of the cancellation and relief provisions in the instant proceeding was not engaged in solely in the interest of the participants and beneficiaries of the Plan.

XXXVIII.

Section 3(37) of ERISA, 29 U.S.C. § 1002(37), does expressly state that a multi-employer plan can provide for the cancellation of past service credit upon an employer's cessation of contributions but that statutory provision does not validate provisions that are incorporated and written into the trust documents which are either objectionable, unreasonable, and/or discriminatorily applied when examined in light of a particular factual situation such as in the instant proceeding.

XXXIX.

The Defendant Fund's actions in the instant proceeding in implementing the cancellation and relief provisions which effectively abolished a vested pension for approximately seventy-five (75) employees, who otherwise would have been entitled to such, was unlawful and is hereby declared null and void.

XXXX.

Defendant Fund is hereby preliminarily and permanently enjoined from calculating service credit for pension purposes as to Plaintiffs Elser and Thomas and the class they represent without referring to and applying said employees' past service credit.

XXXXI.

Those individuals in Sub-Class No. 1, who left the employment of Waste King in a bargaining-unit capacity between January 31, 1973 and January 31, 1975 with at

least ten (10) years of continuous service with Waste King and who did not retire during that time, shall be entitled to a retroactive pension from the date they first wrote and/or write to the Defendant Fund concerning their pension eligibility status, at seven (7%) percent interest per annum if said written correspondence took place prior to the date of this judgment, up to and including the present and subsequent hereto, provided, however, said individuals meet and fully comply with the other rules and regulations established by Defendant Fund not declared invalid and/or unlawful herein.

XXXXII.

Those individuals in Sub-Class No. 2, who are currently working for Waste King in a bargaining-unit capacity, shall be entitled to a pension upon leaving the employment of Waste King in a bargaining-unit capacity and applying for such with Defendant Fund, provided, however, said individuals meet and fully comply with the other rules and regulations established by Defendant Fund not declared invalid and/or unlawful herein.

XXXXIII.

Those individuals in Sub-Class No. 2, who are not currently working for Waste King in a bargaining-unit capacity, including Plaintiffs Elser and Thomas, shall be entitled to a retroactive pension at seven (7%) percent interest per annum from the date they left the employment of Waste King in a bargaining-unit capacity up to and including the present and subsequent hereto, provided, however, said individuals meet and fully comply with the other rules and regulations established by Defendant Fund not declared invalid and/or unlawful herein.

XXXXIV.

The Plaintiffs herein shall be awarded from Defendant Fund the actual costs of suit incurred herein including

reasonable attorneys' fees to counsel of record, the amount of which is to be determined by the Court upon application if the parties herein are unable to agree upon an amount.

CONCLUSIONS OF LAW

The Findings of Fact * * * incorporated herein by this reference as Conclusions of Law.

I.

Defendant Fund violated the LMRA in adopting and applying eligibility rules for pension benefits which cancelled Plaintiff Elser's and Thomas' and the class they represent past service credit.

II.

In doing so, a structural violation of Section 302(c)(5) of the LMRA took place because the adoption and application of said rules were not for the sole and exclusive benefit of the employees.

III.

In determining whether retirement plans violate Section 302 of the LMRA, the Ninth Circuit has articulated three different and distinct theories upon which liability can be based: (1) the arbitrary and capricious standard; (2) the reasonable notice standard; and (3) the sizeable exclusion/reasonable justification standard. *See Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1972) and *Burroughs v. Board of Trustees*, 542 F.2d 1128 (9th Cir. 1978).

IV.

The Defendant's adoption and application of the cancellation and relief provisions in the instant proceeding violated * * * of the above-mentioned standards.

* * * *

*

X.

The Fund violated Section 404(a)(1) of ERISA because it treated Plaintiffs Elser and Thomas and the class they represent disparately from other employees in cancelling their past service credit.

XI.

Judgment shall be ordered herein for Plaintiffs Elser and Thomas and the class they represent as articulated hereinabove.

DATED: _____

DAVID W. WILLIAMS
United States District Court Judge

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Attorneys for the Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 78-2538-DWW (Sx)

MADGE ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

I.A.M. NATIONAL PENSION FUND,
Defendant.

[Filed Nov. 26, 1980]

JUDGMENT

This matter having been tried before the Court on the basis of an agreed statement of facts and the written briefs of the parties and the Court having considered such,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Plaintiffs MADGE ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated, in the above-captioned matter in accordance with the Findings of Fact and Conclusions of Law filed simultaneously herewith.

DATED: ————————

DAVID W. WILLIAMS
United States District Court Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 78-2538-DWW (Sx)

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Appellees and Cross-Appellants,

vs.

I.A.M. NATIONAL PENSION FUND,
Appellant and Cross-Appellee.

[Filed Apr. 16, 1981]

AMENDMENTS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

I-A

The N.L.R.B. proceedings are irrelevant to the Court's determination in this proceeding because the issues and statutes being addressed in this action are different from those that confronted the National Labor Relations Board.

II-A

The plaintiffs, and the class they represent did not waive any statutory rights by their conduct in the February 28, 1975 decertification election.

III-A

The standard of judicial review under Section 302 (c) (5) of the LMRA is the same for actions brought under Section 404 of ERISA.

IV-A

Section 3(37) of ERISA does not validate provisions contained in plan documents that are otherwise objectionable and/or unreasonable.

V-A

The cancellation and relief provisions violate Section 404(a)(1) of ERISA because the adoption and application of such by the defendant were not done solely in the interest of the participants and beneficiaries of the Plan and defraying reasonable expenses of administering the plan.

DATED: This 16th day of April, 1981.

/s/ David W. Williams
DAVID W. WILLIAMS
United States District Court Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 80-6095, 81-5024

D.C. No. CV 78-2538-DWW (Sx)

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees and Cross-Appellants,

v.

I.A.M. NATIONAL PENSION FUND,
Defendant-Appellant and Cross-Appellee.

[Filed Aug. 20, 1982]

Appeal and Cross-Appeal from the United States District Court for the Central District of California

David W. Williams, District Judge, Presiding

Argued and Submitted March 10, 1982

Decided

Before: HAYNSWORTH* and CHOY, Circuit Judges and JAMESON,** District Judge.

OPINION

JAMESON, District Judge:

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* The Honorable Clement F. Haynsworth, Jr., Senior Circuit Judge, United States Court of Appeals, Fourth Circuit, sitting by designation.

** The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

Defendant-appellant, I.A.M. National Pension Fund, has appealed from a judgment holding that the Fund's cancellation provisions are arbitrary and capricious and that plaintiffs-appellees, Madge H. Elser and Margaret C. Thomas, and others similarly situated, were improperly denied pensions.

I. *Factual Background*

The Fund operates a multiemployer pension plan structured in accordance with the requirements of Section 302(c)(5) of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 186(c)(5), and as defined in Section 3(37) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(37). The plan was created in 1960 by the International Association of Machinists and Aerospace Workers (I.A.M.) and several employers of I.A.M. represented employees. The plan is administered by trustees designated by the international union and participating employers. Each participating employer and local union has agreed to comply with terms established in their collective bargaining agreements and in the trust agreement under which the plan was created and operates.

The plan provides that employees must have at least ten years of "credited service" to qualify for pension benefits. "Credited service" is comprised of both "past service credit" (i.e. credit for periods of eligible employment prior to an employer's initial contribution) and "future service credit" (credit for periods of covered employment for which contributions were actually made).[1] Although the pension "vests" when an employee accumulates ten years of credited service, pension payments do not begin until the employee attains age fifty.

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[1] The crediting of past service is common in multiemployer plans. This feature allows employees who are near retirement age when their employer first contributes to the plan to be eligible for benefits calculated on the basis of all their years of employment, after as little as one year's contributions have been made.

Waste King, former employer of Elser and Thomas, began contributing to the pension plan on January 1, 1969, pursuant to its 1968 collective bargaining agreement with I.A.M. District Lodge No. 94. In December of 1974, approximately fifty of Waste King's employees met to consider decertifying the I.A.M. union. The collective bargaining agreement between Waste King and the union expired January 31, 1975, at which time Waste King ceased contributing to the plan. On February 26, 1975, the employees met again to consider decertification. Two days later the union lost a decertification election.

Elser and Thomas were both employed by Waste King for at least ten consecutive years. As a result of Waste King's withdrawal from the plan on January 31, 1975, both appellees had only six years of future service credit. The remainder of their ten years service was past service credit.

When Waste King withdrew from the Fund in 1975, Article IX, Section 4 of the plan provided for retroactive cancellation of all past service credit should an employer cease making contributions to the Fund and remain in business. Excluded from this cancellation were those employees who were already receiving pensions or who had left their employment more than 24 months before or within 30 days after their employer's termination of participation. The plan also allowed the reinstatement of past service credit if the covered employee earned at least five more years of future service credit within eight years of his employer's termination of participation.[2]

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[2] These provisions were included in an amendment to the plan in 1973. The cancellation provisions had undergone several revisions since Waste King joined in the plan in 1969. Originally the plan excluded from cancellation only those plan participants who were already receiving pensions and those who had left their employment more than 24 months prior to their employer's termination of participation.

In December of 1974, the Fund restored its former practice of cancelling only past credited service by repealing the 1973 amend-

The Fund had atempted to give employees notice of these provisions through pension booklets, union meetings and the I.A.M. newspaper.[3]

On June 3, 1975, the Fund notified Waste King and the union by letter that pursuant to Article IX, Section 4, all past service credit accumulated by plan participants who had not left the employment of Waste King over 24 months before or 30 days after January 31, 1975 had been cancelled. This letter, which was not mailed to the plan participants, did not mention that past service credit could be restored by accumulating five additional years of future service credit within eight years or indi-

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ment which required cancellation of future credited service upon an employer's termination of participation.

[3] In 1970, the Fund sent copies of its pension booklet, which contained the rules and regulations of the plan, to I.A.M. District Lodge No. 94, which in turn delivered them to Waste King's payroll office for distribution to the company's covered employees. In July, 1974, the Fund sent to each contributing employer, I.A.M. union office and each covered employee at his home address the 1974 revised edition of the pension booklet. Neither Elser nor Thomas recall receiving the booklet. In January, 1975, the I.A.M. newspaper printed a special report on the I.A.M. National Pension Fund which specifically referred to the Article IX cancellation provisions. The newspaper was mailed to all union members at their last known address.

The subject of pension forfeiture was discussed at two meetings conducted by the local I.A.M. union called for the purpose of discussing the upcoming decertification election. The union's notes of the first meeting, held on December 9, 1974, indicate that in discussing the subject of pension eligibility, the union "[b]rought up the fact that on the pension, if the *decert* [author's emphasis] did go through, the employees *would be considered short term employees and would stand to lose all pension benefits.*" [Emphasis added.] Elser is shown on the union's roster as attending the meeting, but she does not recall being present. Thomas did not attend. Although the pension plan was discussed a second time at a February 26, 1975 union meeting, the record does not reflect whether any of the appellees attended or to what extent the cancellation provisions were discussed.

cate that minimum service requirements could be met by obtaining future service credit from a different contributing employer. No plan participant avoided the forfeiture of past service credit by leaving the employment of Waste King during the 30 day grace period provided by the Fund.[4]

Thomas terminated her employment with Waste King in August 1975 and applied for a pension shortly thereafter. As a result of the cancellation of her past service credit she did not have ten years credited service and her application was denied. Elser terminated employment in October 1977 and was subsequently denied a pension for the same reason.

II. *Proceedings in District Court*

In June, 1978 Elser and Thomas brought this action for injunctive and declaratory relief pursuant to § 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5) and § 404(a)(1) of the ERISA, 29 U.S.C. § 1104(a)(1). They sought, inter alia, a judgment declaring that the cancellation of past service credit was unlawful, and therefore null and void, and "establishing plaintiffs' and the class they represent, eligibility for a pension under the Plan and stating the number of years of credited service to which said employees are entitled." The Fund's answer denied that the cancellation was unlawful and alleged that the plaintiffs were barred by waiver and estoppel, because they had voluntarily decertified the union with full knowledge of the consequences to their pension plan eligibility.

The case was submitted on stipulated facts. In a memorandum decision entered on September 5, 1980 the court found that the cancellation provisions were "arbitrary

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[4] At least nine persons who retired from Waste King before January 31, 1975 (and whose 10 years' service was necessarily based in part on past credit) continued to receive pension payments.

and capricious on their face and as applied to plaintiffs," and, as such, violative of both the LMRA and the ERISA. With respect to Thomas, the court found, as an alternative ground for relief that Thomas had not received adequate notice of the operation of the cancellation provisions. The court rejected the Fund's estoppel defense, since the plaintiffs "did not voluntarily decertify the union." [5]

On October 29, 1980, the court certified the proposed class of approximately 75 plaintiffs in two subclasses. Subclass No. 1 include nonretired employees who left Waste King employment before January 31, 1975 (the termination date of Waste King's contributions, but within 24 months before decertification and withdrawal. Subclass No. 2 includes persons employed by Waste King at the time of decertification and withdrawal. All members of the subclasses had at least ten years of continuous employment with Waste King.

In Findings of Fact and Conclusions of Law filed November 26, 1980, the court enjoined the Fund from removing past service credit in calculating plaintiffs' pension eligibility, and awarded retroactive pension benefits, interest, costs and attorney fees. A formal judgment was entered "in accordance with the Findings of Fact and Conclusions of Law". The Fund appealed from the judgment entered in favor of the plaintiff. Elser cross-appealed from the finding of adequate notice.

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[5] Following the June 3, 1975 letter from the Fund to Waste King the successor union had filed unfair labor practice charges, which were denied by the Regional Director, and the dismissal was affirmed by the General Counsel. Again in 1978, after denial of Elser's individual pension applications, the successor union filed another unfair labor practice charge. The Regional Director refused to issue a complaint, and the General Counsel affirmed. In its memorandum decision the court concluded that the NLRB proceedings were irrelevant since the issues in those proceedings were different from those addressed in this action.

III. *Issues on Appeal*

The issues presented on appeal are (1) whether the plaintiffs waived their claim to past service credit through decertification of the union; (2) whether the Fund's rules for cancelling past service credit were arbitrary and capricious under LMRA § 302 (29 U.S.C. § 186) and ERISA § 404 (29 U.S.C. § 1104); and (3) whether the Fund gave the plaintiffs adequate notice of the cancellation provisions.

IV. *Jurisdiction*

Section 302 of the LMRA, 29 U.S.C. § 186, makes it "unlawful for any employer or association of employers" to pay any money or other thing of value to employee representatives. Section 302(c)(5) creates an exception for employee pension funds, stating that the provisions of Section 302 are not applicable

> with respect to money or other thing of value paid to a trust fund established by such representative, *for the sole and exclusive benefit of the employees of such employer, and their families and dependents* (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents. . . .

29 U.S.C. § 186(c)(5) (emphasis added). Section 302(e), 29 U.S.C. § 186(e), provides that federal district courts have jurisdiction "to restrain violations of this section."

This court has consistently recognized that § 302(e) "grants district courts jurisdiction to determine whether the provisions of a given retirement fund constitute a structural defect in violation of § 302(c)(5)," but does not "confer general power to interfere with provisions of agreements freely entered into between unions and employers which regulate day-to-day administrative mat-

ters of pension coverage and eligibility." *Burroughs* v. *Board of Trustees & Pension Trust, etc.*, 542 F.2d 1128, 1130 (9 Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977). See also *Alvares* v. *Erickson*, 514 F.2d 156, 165 (9 Cir.) *cert. denied* 423 U.S. 874 (1975); *Wilson* v. *Board of Trustees, etc.*, 564 F.2d 1299, 1300 (9 Cir. 1977); *Ponce* v. *Construction Laborers Pension Trust*, 628 F.2d 537, 541 (9 Cir. 1980). A "structural" defect is present when "pension trustees, acting under the authority of the trust fund 'arbitrarily and capriciously' den[y] pensions to employees." *Ponce*, 628 F.2d at 541. "Such arbitrary and capricious conduct is deemed not to be 'for the sole and exclusive benefit of the employees,' and is therefore structurally deficient." *Id.* at 541-42. See also *Tomlin* v. *Board of Trustees*, 586 F.2d 148, 149 (9 Cir. 1978); *Burroughs*, 542 F.2d at 1131.

In the recent case of *United Mine Workers, etc.* v. *Robinson*, —— U.S. ——, 102 S.Ct. 1226 (1982), the Supreme Court made it clear that the "sole and exclusive benefit" provision of § 302(c)(5) embodies no "reasonableness requirement" and that its "plain meaning is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents to the exclusion of all others." *Id.* at 1231.[6]

Robinson involved a collective bargaining agreement where the eligibility requirements and benefit levels were fixed by the agreement. The Court recognized a distinction between *Robinson* and those cases in which the

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[6] In *Robinson*, the Court of Appeals for the District of Columbia Circuit had invalidated the provisions of a collective bargaining agreement allocating health benefits among potential beneficiaries of an employee benefit trust fund. In reversing, the Supreme Court held that pension fund trustees are obligated to enforce the eligibility requirements fixed by the collective bargaining agreement unless modification is required to comply with applicable federal law. *Id.* at 1233.

eligibility rules and benefit levels are fixed by trustees of the fund. The Court said in part:

> The Court of Appeals has held in those cases "that the Trustees have 'full authority . . . with respect to questions of coverage and eligibility' and that the court's role is limited to ascertaining whether the Trustees' broad discretion has been abused by the adoption of arbitrary or capricious standards." *Pete* v. *United Mine Workers of America Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1283 (CADC 1975) (en banc). Noting that "[t]he institutional arrangements creating this Fund and specifying the purposes to which it is to be devoted are cast expressly in fiduciary form," the court stated that "the Trustees, like all fiduciaries, are subject to judicial correction in a proper case upon a showing that they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run." *Kosty* v. *Lewis*, 319 F.2d 744, 747 (CADC 1963), cert. denied, 375 U.S. 964, 84 S.Ct. 482, 11 L.Ed.2d 414.

Id. at 1233.

Concluding that these cases provided no support for the Court of Appeals' holding that eligibility rules fixed by a collective bargaining agreement must meet a reasonableness standard, the Court noted that

> In *NLRB* v. *Amax Coal Co.*, —— U.S. ——, ——, 101 S.Ct. 2789, 2794, 69 L.Ed.2d 672, the Court held that in enacting § 302(c)(5) "Congress intended to impose on trustees traditional fiduciary duties." The Court did not decide, nor do we decide today, whether federal courts sitting as courts of equity are authorized to enforce those duties. It is, of course, clear that compliance with the specific standards of § 302(c)(5) in the administration of welfare funds is enforceable in federal district courts

under § 302(c) of the LMRA. See *Arroyo* v. *United States*, 359 U.S. 419, 426-427, 79 S.Ct. 864, 868-869, 3 L.Ed.2d 915.

Id. at 1233, n. 12.

This court need not decide whether federal courts are authorized to enforce the fiduciary duties imposed on trustees by § 302(c)(5). The *Robinson* Court held that the "substantive terms of jointly administered employee benefit plans must comply with the detailed and comprehensive terms of the ERISA." *Id.* at 1234. "ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet." *N.L.R.B.* v. *Amax Coal Co.*, 453 U.S. 322, 332 (1981). The fiduciary duties provisions of the ERISA, § 404, 29 U.S.C. § 1104,[7] became effective January 1, 1975, 29 U.S.C. § 1114(a), and are applicable to the trustees' actions in this case. This court therefore has jurisdiction pursuant to 29 U.S.C. § 1132(f).

V. *Standard of Review*

The trustees of a pension plan "have broad discretion in setting eligibility rules. A court should interfere only when the rule is unreasonable or its enforcement arbitrary." *Giler* v. *Board of Trustees*, 509 F.2d 848, 849 (9 Cir. 1975); *Sailer* v. *Retirement Fund Trust*, 599 F.2d 913, 914 (9 Cir. 1979). Because of the trustees' presumed expertise and familiarity with the fund, "[i]t is for the trustees, not judges, to choose between various reasonable alternatives." *Ponce*, 628 F.2d at 542, quoting from *Roark* v. *Lewis*, 401 F.2d 425, 429 (D.C. Cir. 1968). See also *Tomlin*, 586 F.2d at 151; *Wilson*, 564 F.2d at 1302.

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[7] § 404(a)(1) provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan. . . ."

The actions of trustees are subject to the same standard of review under the ERISA's fiduciary provisions as they are under the LMRA. *Gordon* v. *ILWU-PMA Benefit Funds*, 616 F.2d 433, 438 (9 Cir. 1980).[8] Therefore the decisions of the trustees "may be reversed only where they are arbitrary, capricious or made in bad faith, not supported by substantial evidence, or erroneous on a question of law." *Rehmar* v. *Smith*, 555 F.2d 1362, 1371 (9 Cir. 1976).[9] See also *Aitken* v. *IP & GCU-Employer Retirement Fund*, 604 F.2d 1261, 1264 (9 Cir. 1979).[10]

VI. *Waiver by Decertification*

In contending that appellees' claims should be barred "by the doctrines of waiver and estoppel," appellant argues that since the appellees "voluntarily" [11] chose to decertify the union, which led to a cancellation of past service credit, they "should not be heard to argue now" that the cancellation of past service credit was "arbitrary and capricious". In contending that the decertification election was an "involuntary" forfeiture of past service

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[8] See also *Fentron Industries* v. *Nat. Shopmen Pension Fund*, 674 F.2d 1300 (9 Cir. 1982). As the court noted in *Gordon*, 616 F.2d at 437, and *Fentron Industries*, 674 F.2d at 1307, Congress designed ERISA to promote pension plans and to protect their beneficiaries.

[9] *Rehmar* adopted the standard of review established in *Danti* v. *Lewis*, 312 F.2d 345, 348 (D.C. Cir. 1962), and *Kosty*, 319 F.2d at 747, which was referred to in *Robinson*.

[10] This court has also recognized a related standard for determining whether a pension plan is structurally deficient, i.e., the "sizeable exclusion/reasonable justification" standard. See *Burroughs* v. *Board of Trustees of Pension Trust, etc., supra; Souza* v. *Trustees of Western Conference*, 460 F. Supp. 483 (N.D. Cal. 1978).

[11] The fund bases its argument on the voluntary/involuntary test applied to the "break-in-service" eligibility rules considered in *Lee* v. *Nesbitt*, 453 F.2d 1309 (9 Cir. 1972); *Giler*, 509 F.2d at 849; and *Wilson*, 564 F.2d at 1301.

credit, appellees point out that the members of subclass No. 1 did not even vote in the decertification election and that subclass No. 2 constituted "but a small fraction" of those who actually voted because all members of the bargaining unit were eligible to vote. The appellees argue, therefore, that their vote was outweighed by that of the non-plaintiff employees who did not stand to lose a vested pension right by voting against the union.

In response the Fund argues that although subclass No. 1 members did not vote, they "should be deemed to have participated in the overall process of decertification, and to have contributed to its result by terminating their employment within the 24 month period preceding the vote, thereby weakening the anti-decertification constituency." As to subclass No. 2, the Fund argues that if the class members were truly members of a "dissenting minority" who were unwilling to give up their pension benefits, they could have exercised their option to terminate employment within 30 days of Waste King's withdrawal from the Fund.

We agree with the district court that the Fund's argument is "unconvincing". There is of course no evidence as to how the class members and other employees voted. The decertification election can hardly be considered a "voluntary" forfeiture of benefits when those who stand to lose the most from decertification are but a small segment of a larger group voting on decertification. The Fund argues that this case is "substantially equivalent" to *Giler*, *supra*. Giler, however, involved a "break-in-service" provision, and "Giler voluntarily left covered employment." We find *Giler* and the other cases cited by appellant distinguishable.

The district court properly found that members of subclass No. 1 simply did not vote in the decertification election, and that members of subclass No. 2 "did not

voluntarily decertify the Machinists Unions." [12] We agree with the district court that appellees' claims are not barred by waiver or estoppel.

VII. *Were Cancellation Provisions Arbitrary and Capricious?*

A. *Findings and Conclusions of District Court*

In both its memorandum decision and subsequent findings of fact and conclusions of law the district court concluded that the cancellation provisions were arbitrary and capricious for several reasons. First, the court noted that "Plaintiffs' forfeiture stands in marked contrast to those persons who left Waste King's employment between January 31, 1970 and January 31, 1973, prior to the 24-month period." The employees in the latter group did not forfeit past service credit even if they had only one year of future service credit and nine years of past service credit. In contrast, members of the plaintiff class, who had up to six years of future service credit, lost all past service credit. Consequently, the court found that "These provisions cancelling past service credit for plaintiffs and not employees who left employment at least two years earlier are arbitrary and capricious on their face and as applied to plaintiffs."

Second, the district court concluded that "the application of the cancellation and relief provisions caused a sizeable exclusion of employees from pension benefits without a reasonable justification for this exclusion." Although the court recognized that "actuary insolvency is a critical determination", it concluded "that there were better ways the Fund could have accomplished this . . . if indeed the Fund was faced with an unfunded liability resulting from Waste King's termination of participation in the Fund."

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[12] In its memorandum decision, the district court relied on *Lee* v. *Nesbitt*, *supra*, in supplying the voluntary/involuntary test.

Finally, the court found that "The trustees of the fund violated [ERISA] Section 404(a)(1) because they treated plaintiffs disparately from other employees by canceling their past service credit." Although the court concluded that the ERISA, 29 U.S.C. § 1002(37), specifically permitted a multiemployer plan to provide for cancellation of past service credit, the court determined that this could not "validate provisions that are otherwise objectionable because they are discriminatorily applied."

B. *Application of Arbitrary and Capricious Standard*

At the outset, we recognize that "[t]he pension is not a defined contribution plan (in which each participant's entitlement is a function of his contribution) but a defined benefit plan for which 'there is no precise "fit" between any individual employee's contribution history and that employee's entitlement to benefits.'" *Central Tool Co.* v. *International Ass'n of Machinists National Pension Fund*, 523 F. Supp. 812, 817 (D.D.C. 1981). The court's affirmative participation should be limited to "those cases where the eligibility requirements are so patently arbitrary and unreasonable as to lack foundation in factual basis and/or authority in governing case or statute law." *Roark*, 401 F.2d at 429. And, the courts will substitute their judgments for the judgments of the trustees, "only if the actions of the trustees are not grounded on any reasonable basis." *Ponce*, 628 F.2d at 542.

After recognizing the limits of the court's participation in evaluating eligibility requirements of a pension plan, the court in *Roark* continued:

> We do say that when such employees are *denied* pensions by a requirement which would *give* pensions to employees having worked a substantially lesser period of time for contributing employers, the bur-

> den is on the trustees to show some rational nexus between the Fund's purpose and the requirement.

401 F.2d at 429.[13]

The appellees have been similarly *denied* pensions by a requirement which would *give* pensions to employees having worked a substantially lesser period of time for a contributing employer. The district court examined the effect of the cancellation provisions on various groups of employees. Specifically, the court compared the effect of the rule on the class of plaintiff-appellees to the effect of the rule on those employees who left Waste King employment more than twenty-four months before January 31, 1975. An employee who left Waste King employment more than twenty-four months before that date did not forfeit past service credit, even if that employee had only one year of future service and nine years of past service. On the other hand, members of the plaintiff class who had up to six years of employment while Waste King was making payments into the fund, lost all past service credit. Appellees actually worked for a contributing employer for as many as six years and received no benefits, while others who may have worked only one year for a contributing employer could receive benefits (upon reaching age 50) simply because they left the employer more than two years before the union decertification.

"[T]he primary purpose of section 302(c)(5) is to insure that pension benefits are awarded to 'as many

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[13] *Roark* was an action by retired coal miners against trustees seeking, inter alia, damages and an order compelling their enrollment as beneficiaries of a trust fund and also seeking injunctive relief. The district court had granted the miners' motion for summary judgment. The court of appeals held that the pension applicants had made a *prima facie* case of unreasonableness in the requirement that the applicant's last regular employment must have been with a contributing operator, but remanded for a hearing at which the trustees would be allowed to show what, if any, reasonable relationship existed between the purpose of the trust and the requirement.

intended employees as is economically possible'." *Ponce*, 628 F.2d at 543, quoting from *Gaydosh* v. *Lewis*, 410 F.2d 262, 266 (D.C. Cir. 1969). See also § 404(a)(1) of the ERISA, note 7, *supra*. The Fund urges the court to focus on the fundamental goal of the Fund trustees: "to protect the Fund, that is, the participants and their employers, who have made and are keeping their long-term commitments to contribute to the Fund, against the financial damage which invariably and inevitably results from terminations of employer participation." We find that the purpose of the Fund is to provide benefits to as many intended employees as is economically possible while protecting the financial stability of the Fund.

The trustees argue that the cancellation provisions are necessary and reasonable to preserve the financial stability of the Fund. The Fund cannot support an "unfunded liability" to pay pension benefits when the employer's "stream of contributions" terminates. Thus the cancellation provisions are reasonably designed to encourage continued participation in the Fund, and, in the event of withdrawal from the Fund, to protect the Fund from accumulation of "unfunded liability."

Appellees concede that the cancellation provisions, if shown to be necessary to preserve the financial integrity of the Fund, would be valid. They agree also that the Fund is correct in contending that the fiscal integrity of the plan depends upon continuing contributions from the employer to pay not only for the current service credit but also to amortize the liability for past service credit. But, although the Fund's concerns are "legitimate in the abstract," appellees argue that "they have no basis in fact because the Fund did nothing to determine if those concerns [about financial integrity] existed when it cancelled the past service credit of Elser and Thomas and the class they represent."

It is true, as appellees contend, that the Fund offered no evidence to show that the failure to cancel past service credit would result in an unfunded liability that

would affect the actuarial soundness of the plan. It was stipulated that "The Fund has never calculated the total unfunded liability for Waste King as of January 31, 1975." [14] There was, in other words, no evidence to show whether or not Waste King's four to six years of contributions on behalf of the plaintiffs would be sufficient to provide for the plaintiffs' pension payment without threatening the financial stability of the Fund.

In *Central Tool, supra*, the plaintiff [15] argued, as here, that the cancellation of forfeiture provisions were arbitrary and capricious because they discriminated among participants and because they were not actuarially jusified. In a careful analysis of the I.A.M. pension plan, the court noted that "It is the purpose of the forfeiture provision to protect the fund from the dumping of unfunded liability as a result of an employer's termination of participation after past service credits have been granted to its employees." Recognizing that "the goal itself is unexceptionable" and that "[a] forfeiture provision may be reasonable if it is actuarially necessary," the court found that the Trustees of the Fund had "not offered any actuarial evidence to support their claim that the provision is tailored to the need to protect the fund." 523 F.Supp. at 816.

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[14] It was stipulated further that the contributions made by Waste King to the Fund from 1969 to 1975 totaled $433,728.00, and that as of January 31, 1975, there were "approximately 66 individuals employed in a bargaining unit capacity for 10 or more continuous years." Appellees argue that the contributions, "a substantial portion of which was contributed on behalf of non-class members who did not possess vested pension rights, succeeded in financially backing the past service credit which was arbitrarily rescinded by the Fund."

[15] In *Central Tool*, the cancellation provisions were challenged by an employer, whose employees were former participants in the pension fund. The Fund had cancelled past service credits for all employees who did not fit into any of the excepted categories. The employer had agreed at the time of termination to establish its own pension fund for the benefit of its employees and to pay the benefits that would have been paid under the defendants' plan.

The court concluded in *Central Tool* that the forfeiture provisions "must be reasonably tailored overall to meet their objectives, that is, there must be a rational relationship between the means and the objective . . . and that the forfeiture provisions may not impose a penalty of greater scale then would be necessary to protect the fund from the dumping of unfunded liability." *Id.* at 817. The court concluded further that in light of the availability of less drastic means to accomplish the objectives of fund preservation [16] the challenged provisions were arbitrary and capricious on their face and hence constituted a structural violation of section 302 of the LMRA.[17]

We agree with the holdings in *Roark* and *Central Tool* and conclude that under the circumstances of this case the Fund had the burden of showing some rational nexus

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[16] In concluding that "far less punitive means than forfeiture" were available to accomplish the legitimate objectives of fund preservation, the court said: "For example, the plan agreement itself contains a separate provision, not challenged here, to remedy the problem of employers terminating from the plan within the first four years of plan participation. The agreement provides that, in the event of such a termination, pension benefits shall only be reduced to the extent necessary to prevent the dumping of unfunded liability (calculated on the basis of a comparison of contributions and actuarially anticipated benefits payments). Defendant has proffered no explanation for the failure of the plan agreement to apply such an actuarially-based mechanism to protect the fund from unfunded liability with regard to the employee groups here involved." 523 F. Supp. at 818.

[17] See also *Winpisinger* v. *Aurora Corp. of Ill., Etc.*, 456 F. Supp. 559 (N.D. Ohio, 1978), where the court considered in detail the I.A.M. pension fund and held invalid a portion of the plan insofar as it applied retroactively to cancel past service credit of two special classes. The court concluded that "if the Trustees choose to 'protect the fund' through a forfeiture of past service credits, the forfeiture must fall evenly on all participants in the Fund. To do otherwise would violate section 1104(a)(1) by virtue of not being an action of the Trustees that is 'solely in the interests of the participants and beneficiaries.'" *Id.* at 573.

between the Fund's purpose and the forfeiture provisions. There is, of course, no question that preservation of the financial integrity of the Fund is a central concern of the trustees. *Robinson*, 453 U.S. 322. This is clearly recognized in *Roark* and *Central Tool*. But here, as in *Central Tool*, appellant had submitted no actuarial evidence to support its contention that the forfeiture provisions are necessary or reasonable to protect the financial stability of the fund.[18]

VII. *Conclusion*

We conclude that (1) the district court's holding that the plaintiffs-appellees did not waive claims to past service credit by the decertification of the union is correct; and (2) the cancellation provisions depriving the appellees of past service credit are arbitrary and capricious, and have a structural defect in violation of § 302 of the LMRA and § 404 of the ERISA by reason of appellant's failure to meet its burden of showing a reasonable relationship between the cancellation provisions and the purpose of the fund, i.e., that the provisions were necessary to preserve the financial soundness of the Fund.[19] The judgment of the district court is affirmed.

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[18] We recognize that there is language in *Wilson* v. *Board of Trustees*, *supra*, which tends to support the Trustee's contention that they were not required to show that the forfeiture provisions were necessary to protect the financial soundness of the fund. *Wilson*, however, is distinguishable in part by reason of the court's finding that Wilson's break in employment was "voluntary". The court in *Wilson* concluded: "Rules in many settings frequently overreach in order to secure their objectives with certainty. This does not in all circumstances make them unreasonable or arbitrary. One must weigh the extent of the overreaching against the importance of certainty. We have done this and find the overreaching, if such it be, in this case tolerable and neither unreasonable nor arbitrary." 564 F.2d at 1302.

[19] Having reached this conclusion, it is unnecessary to consider further the "sizeable exclusion/reasonable justification" standard or the adequacy of the notice to plaintiffs.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 80-6095, 81-5024

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees and Cross-Appellants,

v.

I.A.M. NATIONAL PENSION FUND,
Defendant-Appellant and Cross-Appellee.

[Filed Nov. 10, 1982]

Before: HAYNSWORTH * and CHOY, Circuit Judges and JAMESON,** District Judge.

ORDER

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judge Choy voted to reject the suggestion for rehearing en banc and Judges Haynsworth and Jameson recommended denial of the en banc request.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. F.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Clement F. Haynsworth, Jr., Senior Circuit Judge, United States Court of Appeals, Fourth Circuit, sitting by designation.

** The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.